SEP 11 1980

No. 79-404

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA,

Petitioner,

v.

JESUS E. CORTEZ AND PEDRO HERNANDEZ-LOERA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF FOR RESPONDENT PEDRO HERNANDEZ-LOERA

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QUESTION PRESENTED

Whether the profile employed by the Border Patrol to seize respondents was unlawful because it failed to establish a particularized suspicion that respondents were engaged in illegal activity.

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BRIEF FOR RESPONDENT PEDRO HERNANDEZ-LOERA

STATEMENT OF FACTS

Respondents, Pedro Hernadez-Loera and Jesus E. Cortez were convicted in the United States District Court for the District of Arizona on six counts of transporting illegal aliens in violation of Title 8, United States Code, §1324(a)(2). The judgment was reversed by the Ninth Circuit Court of Appeals holding that the arresting of-

ficers lacked a "founded" or "reasonable suspicion" that respondents were engaged in illegal activity and that the stop of respondents' vehicle violated their rights guaranteed by the Fourth Amendment to the United States Constitution. *United States* v. *Cortez* (Pet. App. 1a-16a). This Court granted the government's petition for certiorari on June 9, 1980.

A. Facts

On Monday, January 31, 1977, at 6:12 a.m., respondents, Pedro Hernandez-Loera and Jesus E. Cortez, were traveling east on U. S. Highway 86 in a pickup truck with a camper shell (J.A. 60, 65, 67, 68, 72). Border Patrol Agents Wayne Gray and Ronald Evans pulled out behind respondents' truck in a marked vehicle, turned on their red emergency lights and seized the truck near Milepost 149 on Highway 86 (J.A. 68, 69, 103).

Prior to making the stop, the agents did not observe any of the occupants or notice anything suspicious about respondents' vehicle. The vehicle, which was common to the area, did not appear to be heavily loaded, was not violating any laws or operating with any visible mechanical defects (J.A. 63, 65, 68, 68, 82, 85, 103, 107-108).

The seizure of the vehicle took place on the Papago Indian Reservation west of Tucson, Arizona (J.A. 25, 86, 87). (The map attached to the response to the petition for certiorari as "Exhibit A" may be helpful in tracing the events referred to herein.) Highway 86 is the

major east-west artery crossing the reservation and connecting Sells, the center of tribal government and largest town on the reservation, with Ajo, Casa Grande, Phoenix, and Tucson, Arizona (J.A. 86, 87). The highway is parallel to and lies approximately twenty-six miles north of the Mexican border (J.A. 21-22, 86, 87). Although the reservation is an alien trafficking area, this is equally true of the entire southern Arizona border area from Lukeville to Douglas, a distance of almost two hundred miles (J.A. 33).[1]

Sometime in late 1976, Border Patrol agents in the Casa Grande sector became aware of suspected alien traffic on the Papago Indian Reservation (J.A.18). This suspicion was based on tracks which were discovered by unidentified agents in an unspecified location (J.A. 18, 35).[2] On January 4 and 16, 1977, agents found tracks containing chevron prints that led from the Mexican border to Highway 86 at Milepost 119, which is approx-

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[1] The Court can take judicial notice of this fact, Stern and Grossman, *Supreme Court Practice* (5th ed. 1978).

[2] Petitioner erroneously asserts, at page 2 of its brief, that the chevron print was discovered near Sells on the Mexican border. In actuality, the testifying agent, James Rayburn, was unable to recall where the print was found, and, as stated above, Sells is approximately twenty-six miles north of the border (J.A. 35). Petitioner's brief, at page 2, also states that the chevron print was found in early December. The record reflects, however, that Rayburn learned of the print around that time, but did not know when it was discovered (J.A. 19).

imately six miles east of Sells. These tracks then followed the highway east for three miles until they disappeared on the road surface at Milepost 122 (J.A. 21, 51, 55, 91-92).[3]

In total the agents found four sets of tracks (J.A. 24, 52-53). Agent Gray said they were made at night by groups ranging in size from seven to sixteen people (J.A. 55, 57). He believed that the chevron groups traveled only on or near weekends although this is not substantiated by the record (J.A. 60).[4] After January 16, the agents frequently inspected the area for additional tracks, but apparently found none (J.A. 35).

Finally, the agents believed, due to the disappearance of the tracks onto Highway 86, that the chevron groups were picked up by a recovery vehicle (J.A. 26). The agents had never seen these people or the vehicle, and had no idea where the recovery vehicle came

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[3] Petitioner alleges, at pages 2, 14, and 20 of its brief, that the chevron groups traveled in a "sparsely populated area", but fails to point out that they reached a point only six miles east of Sells on Highway 86 which is a well-traveled road through the Papago reservation (J.A. 25, 64, 67, 80).

[4] Officer Gray testified that this belief was based on the fact that, "The two prior times *I had personally* tracked was near the weekend . . ." (emphasis added) (J.A. 60). In actuality, the chevron group was believed to have been active on Tuesday, December 28; Sunday, January 2 or Monday, January 3; Tuesday, January 11 or Wednesday, January 12; and Saturday, January 15 (J.A. 24, 39, 55, 58).

from or went to — north to Casa Grande and Phoenix, west to Ajo, or east to Tucson (J.A. 34, 41-42, 86-87, 92, 119).[5]

On January 31, 1977, Agents Gray and Evans were assigned by their superiors to patrol the Altar Valley, an area approximately thirty-five miles east of the chevron track sightings (J.A. 61-62, 80). The agents began their surveillance at 1:00 a.m. from Milepost 149 (originally referred to as Milepost 114 by Gray) on Highway 86, twenty-seven miles east of the point where the chevron groups reached the highway (J.A. 63, 93). The agents speculated that a chevron group might be active on that morning. They chose their position at Milepost 149 so that they could observe traffic both on Highway 86, which runs east and west, and Highway 286, which runs north and south through the Altar Valley to the Mexican Border (J.A. 60-62).

On the same day, Agents Gray and Evans constructed a profile for seizing and searching vehicles in order to determine whether alien activity had occurred on Highway 86 at Milepost 122 (J.A. 60, 62-65, 78, 79). Agent Gray intended to utilize the profile even though he had no information suggesting the crossing of a chevron group that night and even though such a cross-

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[5] There is clearly no support in the record for petitioner's assertion, at page 15 of its brief, that the agents had information regarding "the particular movements of the suspected pickup vehicle."

ing could have been completed before the agents were in position (J.A. 77-78, 85).

The agents' profile was predicated upon their supposition that the recovery vehicle would pass them heading west and return in the opposite direction. They implemented this profile even though Officer Gray expected the recovery vehicle to approach the Milepost 122 recovery site from the opposite direction (J.A. 69, 84).[6]

Within their profile, the officers allowed for a ninety minute period of absence in order to seize a vehicle (J.A. 64). They believed a vehicle could make the anticipated fifty-four mile round trip within this time limit (J.A. 64, 93). This same time frame easily permitted a vehicle to make the sixty-six mile round trip to Sells (J.A. 80). Agent Gray's testimony indicated that the chevron groups appeared to spend little if any time waiting for the recovery vehicle, that they were picked up soon after reaching the easily identifiable spot (Milepost marker 122), and that the round trip could

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[6] Petitioner's brief, at pages 3 and 20, is entirely misleading on this point. It attempts to rationalize Gray's inconsistent explanation. He testified that it was his belief that the recovery vehicle would approach the chevron group from the west (a vehicle passing the agents at Milepost 149 on its way to Milepost 122 would have been coming from the east) because, "We assumed that because the aliens were walking in an eastward direction after hitting the highway that apparently the vehicle would be going in the same direction or that therefore, to myself there wouldn't be any need for them walking in an eastward direction." (J.A. 69).

have been made in less than an hour (J.A. 91, 95, 97, 98).

Gray also hypothesized that there would be eight to twenty people in the chevron group (the largest group previously contained fifteen or sixteen people) and that they would travel in a vehicle capable of carrying that many people without arousing suspicion (J.A. 57, 63). The officers had no idea what type of vehicle was being used (J.A. 78) or whether the vehicle seized could contain 20 people without arousing suspicion (J.A. 74, 78). The profile included vans, pickup trucks with camper shells, U-Haul trucks, motor homes, trailers and other types of vehicles with Gray could not recall (J.A. 63).[7] Sedans and commercial vehicles were not included, although Gray testified that these vehicles could be used without arousing suspicion and that, due to the darkness, it was impossible to see how many people were riding in an automobile (J.A. 63, 79, 89-90, 99).

It was the agents' intent to stop and search every vehicle which met the criteria set forth above (J.A. 77-78).[8] They had received no information indicating

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[7] Petitioner's brief, at page 5, alleges that those types of vehicles were the ones "most commonly used for smuggling sizeable groups of aliens. . . (J.A. 63-64)." This is not reflected by Gray's testimony.

[8] Gray's testimony on this point directly conflicts with petitioner's assertion, at page 12 and 16 of its brief, that the agents only intended to briefly question the vehicle's occupants:

> "Q: So if you would have seen at that time during that time frame, your time frame of between 2:00 and 6:00 o'clock, if you had seen a van, a truck, a truck with a camper shell and a

that there would be alien traffic near Mileposts 119 or 122 on that morning (J.A. 85, 87-88). They had no information regarding the recovery vehicle actually used, its place or origin or its destination (J.A. 41-42, 86-87, 119).

Traffic on Highway 86 at Milepost 149 was normal for the time of day of the agents' surveillance. In a five-hour period fifteen to twenty vehicles traveling west and six to ten going east passed their location (J.A. 64, 67).

At 4:30 a.m., a vehicle going west toward Sells passed the agents, which Evans identified as a "greenish-yellowish" pickup truck with a camper shell (J.A. 103-104). Although Gray, who was closer to the road, testified that it was too dark at that time to identify the color (J.A. 66), he did obtain a partial license number, "GN 88" (J.A. 65).

One hour and forth-two minutes later, at 6:12 a.m., a pickup truck passed the agents heading east (J.A. 67). They believed it to be the same vehicle that they had seen at 4:30 (J.A. 67, 104).[9]

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motor home, a trailer, all these vehicles, go west and return east, you would have searched every single one of them?

* * *

A. Had they been capable of hauling this amount of aliens well hidden, you bet," (J.A. 78). (See also J.A. 77).

[9] Respondent Cortez, a resident of Phoenix, testified that he traveled through Casa Grande and then south until he joined Highway 86 and headed east to Sells, a route he believed to be shorter than going through Tucson (J.A. 119-120). By taking this route, he would have passed the agents only once headed in an easterly direction (J.A. 92).

The agents pulled out behind respondents' vehicle and ascertained that the license number was "GN 8804". They then made the decision to stop the vehicle (J.A.68). At the time of the seizure, the agents had observed nothing unusual about the vehicle or its manner of operation, nor had they seen its occupants (J.A. 63, 65, 68, 78, 82, 95, 103, 107-108). They, nevertheless, intended to search the vehicle because it fit their profile (J.A. 77, 78).

The vehicle stopped when signalled to do so by the Border Patrol officers (J.A. 68). Cortez alighted from the driver's side and met Agent Gray at the rear of the pickup truck (J.A. 68-70). While this occurred, Agent Evans, with a shotgun at port arms, secured the site (J.A. 104-105). Gray questioned Cortez about his citizenship and told him to open the camper door (J.A. 121-122).[10] Six aliens, a satchel, a flashlight and respondent Hernandez' chevron soled shoes were discovered as a result of this search and seizure (J.A. 70-71)

B. Court Of Appeals' Ruling

Petitioner's brief, at pages 7-8, quotes language employed by the Ninth Circuit Court of Appeals in reversing the denial of respondents' motion to suppress.

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[10] Agent Gray testified that respondent Cortez opened the camper door without being asked or told to do so (J.A. 70).

However, petitioner, at the bottom of page 7 of its brief, omits that portion of the opinion which relies upon decisions of this Court. The omitted portions are as follows:

> The quantum of cause necessary in such (Fourth Amendment seizure) cases was established by the Supreme Court in *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). "[0]fficers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country". 422 U.S. at 884, 95 S.Ct. at 2582.
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> * * *
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> As Mr. Justice Harlan said, discussing the Terry standard in his concurring opinion in *Sibron* v. *New York*, 392 U.S. 40, 73, 88 S.Ct. 1889, 1907, 20 L.Ed.2d 917 (1968), '[T]here must be something at least in the activities of the person being observed or in his surroundings that affirmatively suggests particular criminal activity . . . "(emphasis the court's) (Pet. App. 5a, 7a)

SUMMARY OF ARGUMENT

This case presents the issue of whether border patrol officers will be permitted to seize vehicles targeted for suspicion based solely on a subjectively developed profile without a particularized suspicion regarding the individual seized. The answer to this question will determine whether Border Patrol officers in the future will be permitted to conduct random stops with less than a founded suspicion or whether they will be required to

employ established surveillance techniques. The validity of a founded suspicion seizure must be evaluated on the totality of relevant circumstances and "specific and articulable facts taken together with rational inferences from those facts." *Terry* v. *Ohio*, 392 U.S. 1, 21 (1968). *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884 (1975). The Fourth Amendment demands objective particularity prior to seizing an individual in order to minimize governmental intrusions upon the American public.

The officers objectively knew, at most, that respondent traveled past the back to their position in over 90 minutes. Everything else the officers utilized to stop the vehicle was based upon assumptions derived from either stale, inaccurate or non-existent information. Even assuming the validity of the officers' assumptions, no rational nexus existed between those assumptions and respondents sufficient to justify this seizure. The particularized suspicion required by *Terry* v. *Ohio*, supra, and related cases was never established. The officers' random seizure of vehicles within their subjectively created profile does not comport with Fourth Amendment protections afforded individuals, and therefore was not good police work. The seizure of respondents was arbitrary and therefore unlawful. *United States* v. *Brignoni-Ponce,* supra, at 882; *Delaware* v. *Prouse*, 440 U.S. 648, 653-654 (1979).

THE PROFILE EMPLOYED BY THE BORDER PATROL TO SEIZE RESPONDENTS WAS UNLAWFUL BECAUSE IT FAILED TO ESTABLISH A PARTICULARIZED SUSPICION THAT RESPONDENTS WERE ENGAGED IN ILLEGAL ACTIVITY.

A. Petitioner Is Required To Demonstrate More Than A Founded Suspicion In Order To Justify The Intrusion Occasioned By The Seizure Of Respondents.

The officers' stop of respondents' camper for the purpose of discovering aliens was not the "modest" intrusion of an investigative stop sanctioned by this Court in *United States* v. *Brignoni-Ponce*, supra, at 880.[11] In *Brignoni-Ponce*, the officers seized the vehicle for the sole purpose of briefly questioning the occupants about their citizenship and immigration status. 422 U.S. at 875, 880. Agents Gray and Evans seized respondents for the express purpose of searching the camper for aliens solely because the camper fit their profile (J.A. 77, 78). Petitioner, at page 16 of its brief is entirely incorrect in argu-

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[11] The government cannot and does not contend that a seizure did not occur. The issue is well settled that when a vehicle is stopped by a law enforcement officer and its occupants detained, a "seizure" has occurred. *Delaware* v. *Prouse*, supra, at 653, citing *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 556-558 (1976); *United States* v. *Brignoni-Ponce*, supra, at 878; cf. *Terry* v. *Ohio*, supra, at 16.

ing that the intrusion complained of here is no more severe than the one in *United States* v. *Brignoni-Ponce*, supra.

Assuming a seizure less intrusive than an arrest,[12] this Court evaluates its reasonableness by balancing " 'the public interest and the individual's right to personal security free from arbitrary interference by law officers.' *Pennsylvania* v. *Mimms*, 434 U.S. 106, 109 (1977); *United States* v. *Brignoni-Ponce*, supra, at 878." *Brown* v. *Texas*, 443 U.S. 47, 50 (1979). The reasonableness of a seizure under this balancing test depends on the facts of each individual case. *Delaware* v. *Prouse*, supra, at 654.

The societal interest in this case is identical to the one in *United States* v. *Brignoni-Ponce*, supra. 442 U.S. at 875. In both cases, the arresting officers' concern was the discovery of aliens illegally in this country. It is noteworthy, however, that the problem presented by illegal aliens is basically an economic one. *United States* v. *Brignoni-Ponce*, supra, at 878-879. Although this is admittedly an important interest, as a matter of policy it does not constitute as great an interest as those presented in *Delaware* v. *Prouse*, supra (safety on streets and

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[12] A roving patrol stop of a vehicle is much more intrusive than either a checkpoint stop, which provides notice and security of equal treatment to all persons, or the stop of a pedestrian who has the right to walk away rather than have his freedom from restraint interrupted. *United States* v. *Mendenhall*, 78-1821 (May 27, 1980) slip op. 11; *United States* v. *Martinez-Fuerte*, supra, at 558.

highways), *Brown* v. *Texas*, supra, and *Reid* v. *Georgia*, 79-448 (June 30, 1980) (stopping the flow of dangerous drugs), and *Terry* v. *Ohio*, supra (the prevention of crimes against property as well as the protection of the lives of police officers and bystanders). These cases relate note only to economics but also to the protection of human life, a more compelling interest than the seizure of aliens. This interest is also not as compelling as the others for the simple reason that the detection of aliens is a much easier law enforcement objective than a discovery of narcotics or unlicensed drivers. Petitioner's expressed desire to protect aliens is a makeweight argument in this case for the reason that nothing available to the officers suggested that any person in respondents' vehicle was in danger. *United States* v. *Brignoni-Ponce*, supra; *Sibron* v. *New York*, 392 U.S. 40, 64 (1968).

In determining the seriousness of particular intrusions this Court has looked to the scope, purpose, and societal impact of the intrusions. In *United States* v. *Brignoni-Ponce*, supra, for example, the fact that Mr. Brignoni was stopped for the purpose of answering one or two questions and possible producing documents demonstrating his right to be in this country, a procedure usually consuming less than one minute, led the Court to conclude that the intrusion was minimal. 442 U.S. at 880. However, the Court held this seizure unreasonable in spite of its limited nature because the basis for stopping the vehicle did not justify a reasonable belief that a crime was being committed. 442 U.S. at 886.

The situation here is different because the officers seized the vehicle for the purpose of searching it and did search it (J.A. 78, 122). *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973). This can hardly be deemed as minor an intrusion as a one minute detention for questioning. This intrusion was also more severe because it violated two factors which have been held significant by this Court: the possibility of abuse due to law enforcement officers' unrestrained discretion, and the resultant resentment and anxiety which would occur if such practices are allowed to continue. As the Court in *Brown* v. *Texas*, supra, at 51 stated:

> A central concern in balancing these competing considerations (the public interest and the individual's right to personal security) in a variety of settings has been to assure than an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. See *Delaware* v. *Prouse*, 440 U.S. 648, 654-655 (1979); *United States* v. *Brignoni-Ponce*, supra, at 882. To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers. *Delaware* v. *Prouse*, supra, at 633. See also *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 558-562 (1976).

The intrusion does not qualify as minimal under either of these criteria.

The officers' suspicions focused on, and permitted the seizure of, not only this particular vehicle and respondents, but on a large class of vehicles without regard to their appearance or that of their occupants.

In addition, the seizure of respondents' vehicle was not "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown* v. *Texas*, supra, at 51. It is obvious that the officers' scheme did nothing to prevent the seizure of profile vehicles which otherwise did not appear to be engaged in criminal activity. Any limitations on the agents' conduct in regard to the seizure of respondents were non-existent or, at best, self imposed.

Petitioner argues, at pages 23-25 of its brief, that the Ninth Circuit's decision imposes an unworkable burden on law officers and that Gray and Evans performed "good detective work" in seizing respondents' vehicle. Good detective work, however, required less intrusive, but equally effective measures for the detection of aliens.

Although the chevron tracks were always found in the same place, Gray and Evans were positioned twenty-seven miles away from that area (J.A. 93). This was apparently due to the fact that their superiors disagreed with Gray's hunch that a chevron group might be active during the morning in question (J.A. 61-62). The logical approach would have been to station agents near Milepost 122, where the tracks consistently disappeared onto the highway, to enable the officers to see the group emerge and to ascertain the specific recovery vehicle be-

ing used. This was particularly important in light of the fact that the agents had no information regarding the type of recovery vehicle used, where it came from, or its ultimate destination (J.A. 78, 92). It would have been good police work for the agents to be in a location where they could apprehend the smugglers without unnecessary intrusions upon the privacy of innocent travelers.

Two other reasonable approaches would have allowed Agents Gray and Evans to maintain their position in the Altar Valley and obtain information about the chevron group on the morning in question. One option available to the officers was the utilization of a sensor at Milepost 122 to determine the time of any suspected activity. The sensor would have given the agents a narrow time frame within which to expect the recovery vehicle. This practice was in operation in the Altar Valley (J.A. 89).

The other option, based on the agents' assumption that respondents made a round trip past their position, was to follow the vehicle, obtain a license number and description and then have the vehicle followed until sufficient information could be obtained to either seize the vehicle or conclude that it was engaged in no illegal activity. In *Sibron* v. *New York*, supra, Justice Harlan, concurring, recommended a similar approach. 392 U.S. at 73. This option could have been used alone or in conjunction with a sensor.

Finally, the agents could have presented their profile to a magistrate for a warrant to search and seize vehicles

which fit that description. See *United States* v. *Martinez-Fuerte*, supra, at 555; *Almeida-Sanchez* v. *United States*, supra, at 283 (Powell, J., concurring). This procedure would have provided the "neutral limitations on the conduct of individual officers" which this Court considers very important. *Brown* v. *Texas*, supra, at 51.

The profile's failure to circumscribe the officers' discretion clearly establishes that the intrusion herein was neither minimal nor designed to reasonably evaluate the "degree of community resentment aroused" by the projected seizure of all profile vehicles. *Terry* v. *Ohio* supra, at 17, fn. 14; *United States* v. *Martinez-Fuerte*, supra, at 558.

A seizure based on a profile developed by officers in the field, in an effort to locate offenders who had not been active for more than two weeks in an area twenty-seven miles away, and which could result in the seizure and search of numerous innocent travelers, can hardly be deemed a minimal intrusion. The Fourth Amendment demands that such a severe intrusion be based on either probable cause or, at the very least, be carried out pursuant to a particularized suspicion as to each and every vehicle to be seized. *Brown* v. *Texas*, supra, at 51; *United States* v. *Brignoni-Ponce*, supra, at 881; *Carroll* v. *United States*, 267 U.S. 132, 155-156 (1925).

B. The Profile Employed By The Border Patrol To Seize Respondents Was Unlawful Because It Failed To Establish A Particularized Suspicion That Respondents Were Engaged In Illegal Activity.

Assuming arguendo, that a minimal intrusion as envisioned by *United States* v. *Brignoni-Ponce,* supra, occurred when the officers seized respondents, the seizure was unlawful in light of the information available to the agents. The Fourth Amendment to the Constitution protects the individual in an automobile from unfettered intrusions by law enforcement officers. *Delaware* v. *Prouse,* supra, at 661; *United States* v. *Brignoni-Ponce,* supra, at 882; *Carroll* v. *United States,* supra, at 155-156.

In order to seize a particular vehicle for the purpose of questioning its occupants about suspected criminal activity, a Border Patrol officer must be "aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." *United States* v. *Brignoni-Ponce,* supra, at 884.

In determining the validity of any seizure, this Court recently reiterated that "a seizure must be based upon specific, objective facts indicating that society's legitimate interests require the seizure of this particular individual." *Brown* v. *Texas,* supra, at 51. See also *Beck* v. *Ohio,* 379 U.S. 89, 91 (1964). The particularity requirement has consistently been employed by this Court.

Delaware v. *Prouse,* supra, at 661; *United States* v. *Brignoni-Ponce,* supra, at 884.

This Court examines each particular case in light of the information the officers had available to them at the time the order to stop was given. Nothing which was discovered after the seizure took place, such as respondent Cortez's hurried exit from the truck or the movement of the curtain in the camper's back window, can be considered in determining the validity of the stop. *Sibron* v. *New York,* supra, at 63; *Bumper* v. *North Carolina,* 391 U.S. 543,fn. 10, (1968); *United States* v. *DiRe,* 332 U.S. 581, 595 (1948).

In an effort to assist both the lower courts and law enforcement officers in the performance of their duties, this Court, in *United States* v. *Brignoni-Ponce,* supra, at 884-885, listed several factors to be considered in establishing the basis for founded suspicion. These factors can be separated into three general areas which concern the vehicle, its occupants, and the area of seizure. The relevant factors are:

> ". . . the characteristics of the area in which they (the officers) encounter the vehicle. Its proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic . . . information about recent illegal border crossings in the area. The driver's behavior may be relevant, as erratic driving or obvious attempts to evade officers . . . Aspects of the vehicle itself may justify suspicion . . . The vehicle may appear to be heavily loaded, it may have an extraordinary number of passengers, or the officers may observe

> person trying to hide. The Government also points out that trained officers can recognize the characteristic appearance of persons who live in Mexico. . . . In all situations the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling. (Citations omitted). 442 U.S. at 884-885.

The Government boldly asserts that the *Brignoni-Ponce* factors are so completely satisfied that not only a founded suspicion but also probable cause have been established. The latter argument was never asserted to the trial court, the Ninth Circuit Court of Appeals, or even to this Court in its petition for writ of certiorari. The Border Patrol agents' expressed intent to search and seize every vehicle which met their profile does, however, raise a substantial question about the government's ability to rely upon a founded suspicion rather than probable cause (J.A. 78). See *Almeida-Sanchez* v. *United States,* 413 U.S. 266 (1973). A careful examination of the record establishes that neither test was satisfied and that the resultant seizure was unlawful. The record before this court will be analyzed in *seratium* in terms of the subjective profile created by Agent Gray and the enunciated *Brignoni-Ponce* factors.

Agent Gray testified that the seizure conducted herein was predicated upon the profile he developed in an effort to apprehend aliens led by "Chevron."[13] This

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[13] Contrary to petitioner's position, at page 24 of its brief, that no profile was utilized, this officer's testimony and the record reflects that they acted upon a profile (J.A. 78, 79). Petitioner's

profile was directed at the seizure of vehicles which would not arouse suspicion. If a vehicle did not arouse suspicion, Grey felt it was suspicious. A profile which permits a seizure on nothing more than this is not only arbitrary but illogical.

A criminal profile, at very best, is a compilation of typical characteristics about a particular type of criminal based upon empirical or objective data and an accumulation of many officers' past experiences and observations which are used to focus suspicion on an individual. A profile without any objective foundation has no validity. The profile implemented by Agent Gray was not based upon any empirical data or the accumulation of objective data establishing the specific characteristics of the vehicle to be seized.[14]

Assuming only one vehicle was being used, any profile vehicle to be seized had to be related to the number of anticipated passengers. Agent Gray knew that in the past alien groups at Milepost 122 ranged in size from seven to fifteen or sixteen people (J.A. 55,57). He decided, however, that the next chevron group to enter the United States would range in size from eight to twenty.

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previous position was that a profile had been employed. See petitioner's request for hearing before the Ninth Circuit Court of Appeals, pages 12 and 13.

[14] The record does not reflect that Gray had any experience in developing a profile. The government appears to concede as much at page 25 of its brief in stating that the profile was not based on the agent's prior experience with alient smuggling.

Officer Gray had no objective information, either direct or circumstantial, to reach this conclusion. His conclusion can only be characterized as a hunch.

A similar hunch was employed by Agent Gray in determining the type of recovery vehicle to be used. The agents had never seen the vehicle or vehicles used, nor did they have any information regarding the vehicle or vehicles. Gray and Evans intended to seize all vehicles capable, without arousing suspicion, of carrying between eight and twenty aleins that went past their position and returned within ninety minutes (J.A. 63). This profile completely disregarded Gray's original assessment that the recovery vehicle would approach the aliens from the west and continue eastbound rather than make a return trip (J.A. 77, 78).

The profile was underinclusive in that, although the officers admitted sedans, station wagons, and commercial vehicles could carry the required number of aliens without arousing suspicion, these vehicles were not subject to either suspicion or seizure. Indeed, petitioner's brief, at pages 13-14, quotes language from *United States* v. *Brignoni-Ponce,* supra, at 885, which recognizes that station wagons are frequently used to transport illegal aliens. Agent Gray even admitted that sedans and station wagons, especially during hours of darkness, were clearly capable of carrying at least eight people without arousing suspicion (J.A. 63). No reason was ever offered explaining why these vehicles were not subject to suspicion. The officers, at any rate, decided to focus their attention upon pickups, pickups with camper

shells, vans, motor homes, and other unspecified vehicles capable of carrying the proposed eight to twenty aliens (J.A. 63, 78, 99).

Another class of vehicles, commercial vehicles, was exluded by the agents because they assumed company policies prohibited use of the vehicles for illegal purposes (J.A. 90, 100). This view assumes too much. It is axiomatic that employees could engage in illegal conduct without their employers' knowledge. Company vehicles are sometimes provided to workers for their private use during their free hours. It is also not unusual for company vehicles to be sold for private use when they are old or no longer needed. These factors were ignored by the agents and no rational explanation exists for the agents' assumptions.

The automobile profile was overly broad because it created a non-particularized suspicion of persons going by the agents' position without requiring anything additionally suspicious or unusual by way of information or observation. For example, the vehicle seized herein was not speeding or being operated in a furtive manner, suggesting, as is discussed in *Brignoni-Ponce,* an attempt to evade the agents or detection (J.A. 95). The agents in effectuating the stop completely disregarded the fact the vehicle neither appeared to be heavily loaded nor had any visible mechanical defects (J.A. 107-108). The Court in *Brignoni-Ponce* considered the manner of operation and appearance of a vehicle important in establishing a founded suspicion. When these factors suggest innocent conduct they also negate a founded suspicion. This pro-

file is constitutionally overbroad because the agents in applying it, ignored the rational inferences suggesting innocence to be drawn from their observations. *Reid* v. *Georgia,* supra.

It is quite obvious that the profile utilized herein was created without any indicia of reliability designed to minimize the intrusion upon the general public. *Delaware* v. *Prouse,* supra, at 661, 662-663. The profile, aside from being arbitrary and without any limitations upon the officers' discretion, did not encompass a particularized suspicion of criminal activity based upon objective facts indicating that "society's legitimate interests required the seizure of this particular individual." *Reid* v. *Georgia,* supra; *United States* v. *Mendenhall,* supra; *Brown* v. *Texas,* supra, at 51; *United States* v. *Brignoni-Ponce,* supra, at 884.

The officers who were twenty seven miles away from the site of suspected criminal activity could not reasonably have concluded respondents had been there. The profile did nothing to rule out that any vehicle seized had gone to Kitt Peak National Observatory, had equipment problems and was returning to Three Points or Tucson for repairs, or had gone to Sells. The seizure was not the product of any particularized suspicion requiring that respondents should be questioned or their vehicle searched for illegal aliens. As this Court pointed

out in *Delaware* v. *Prouse,* in reaffirming the prohibition of the exercise of unbridled discretion by law enforcement officers:

> To insist neither upon an appropriate factual basis for suspicion directed at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches. . ." 440 U.S. at 661, quoting from *Terry* v. *Ohio,* supra, at 22.

The officers ignored every thing they saw or knew negating any reasonable suspicion of criminal activity by relying completely upon the profile.

The fact that the profile was designed solely for the purpose of seizing cars on January 31, 1977, did not eliminate the need for it to be rationally ralated to the facts available. The Fourth Amendment's protection against unreasonable seizures required the profile be designed in a manner that would preclude the seizure of all persons making a return trip on Highway 86. The profile, contrary to the government's suggestion at page 24, was not established as a result of weeks of investigative efforts; it was created the night of the seizure in an effort to focus suspicion on an unknown vehicle and its unknown direction of travel.

The officers' failure to position themselves in a location which would have helped establish a particularized suspicion makes the seizure arbitrary. *Delaware* v. *Prouse,* supra. The profile herein was

developed on an inarticulate hunch which might have justified surveillance but was not an articulable suspicion of criminal conduct justifying a seizure. The officers saw no crime being committed which they were obliged to interrupt, therefore, they should have continued their investigation. *Sibron* v. *New York,* supra, at 73 (Harlan, J., concurring); *Brown* v. *Texas,* supra.

The use of this profile is equivalent to the practice condemned in *Brignoni-Ponce* wherein the government seized a vehicle simply because of the occupants' ethnic appearance. Gray's profile permitted the seizure of vehicles which did not specifically arouse a reasonable suspicion, thereby unconstitutionally permitting the officers to exercise their unfettered discretion. *Ybarra* v. *Illinois,* 444 U.S. 85 (1979); *Delaware* v. *Prouse,* supra; *United States* v. *Brignoni-Ponce,* supra.

The profile failed to consider the agents' inability to observe the occupant's or driver's demeanor as a means of negating any reasonable suggestion of criminal activity. *United States* v. *Brignoni-Ponce,* supra; *Brown* v. *Texas,* supra; *Ybarra* v. *Illinois,* supra; *Sibron* v. *New York,* supra. Very little needs to be said about these factors, simply because the officers did not see anyone in respondents' vehicle (J.A. 82). They obviously had no idea how many passengers there were nor whether any persons were attempting to conceal themselves. There was no information available which demonstrated that respondents' vehicle carried aliens.

The occupants, their appearance and activities are highly relevant factors in any seizure. This Court has

never upheld a seizure for which a founded suspicion was required where the officers had no information regarding the person seized. It is impossible to reasonably conclude that criminal activity may be afoot when the people allegedly committing the crime are unknown and unseen. *Brown* v. *Texas,* supra, *Ybarra* v. *Illinois,* supra; *Delaware* v. *Prouse,* supra; *United States* v. *Brignoni-Ponce,* supra, Sibron v. *New York,* supra.

Nothing available to the officers under the remaining *United States* v. *Brignoni-Ponce* factors related to the area of suspected criminal activity created a founded suspicion. Petitioner argues that a totality of circumstances analysis would require a reasonable person to suspect criminal activity warranting a limited intrusion. The record simply does not support this conclusion. Justice Harlan, concurring, framed the appropriate question in *Sibron* v. *New York,* supra, at 75, when he inquired as to whether a "prudent and reasonable man (such as a magistrate, actual or hypothetical)" would believe that a particular person has committed or is committing a crime simply because of his location. The Court held that location alone was not sufficient in *Sibron* v. *New York,* supra, as well as in all other decisions in which the issue has arisen. *Reid* v. *Georgia,* supra; *Brown* v. *Texas,* supra; and *Ybarra* v. *Illinois,* supra.

A similar conclusion is dictated here. The agents' last information about any suspected alien activity at Milepost 122 related to tracks made fifteen days prior to the seizure. The officers, nevertheless, assumed the

Milepost 122 area was a continuing smuggling area. This assumption had no factual basis. The absence of alien traffic when coupled with the lack of any recent information about expected or actual alien activity severely undermined the agents' assumption that this was a smuggling area.

The record fails to establish a rational nexus between respondents and the area sufficient to create a reasonable basis for seizing them. The officers' direct observations certainly negated any inference of criminal activity by respondents in an area twenty seven miles away. *Reid* v. *Georgia,* supra; *Brown* v. *Texas,* supra. The officers could only speculate as to whether the vehicle herein had ever been in the smuggling area. See *Henry* v. *United States,* 361 U.S. 98 (1959).

The ninety-minute travel time allotment is meaningless for purposes of a particularized suspicion. The agents testified the recovery process was quick (J.A. 95, 97, 98). A vehicle traveling at 55 m.p.h., as was respondents', would make the return trip within one hour. The fact that respondents' vehicle returned well beyond the agents' allotted time period should have excluded it from suspicion and seizure. The agents have concluded that respondents did not recover any aliens.

Petitioner's request for this Court to authorize roving patrols to seize all vehicles without a particularized suspicion whenever a vehicle comes from a suspected area of alien activity is a return to the procedure condemned in *Almeida-Sanchez* v. *United States,* supra, and contrary to this Court's decision in *Reid* v. *Georgia;*

supra, *Brown* v. *Texas,* supra, *Ybarra* v. *Illinois,* supra; and *United States* v. *Brignoni-Ponce,* supra.

For purposes of creating a founded suspicion, Three Points, Arizona at Milepost 149 is relevant only for traffic traveling north on Highway 286, a border access route. The officers herein were assigned by their superiors to surveil the Altar Valley which is directly south of Milepost 149 and across the mountains to the east of Milepost 122. The presence of respondents as they traveled east across Highway 86 past Milepost 149 in and of itself created no founded suspicion to seize them. The traffic along Highway 86 was normal and respondents at all times traversed the highway just like any other travelers. Nothing about the area of detention suggests criminal activity. The officers could only speculate about such activity. This type of speculation does not comport with Fourth Amendment protections afforded individuals to whom:

> Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, work place, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. *Delaware* v. *Prouse,* supra, at 662.

Respondents' right to freedom from restraint was violated when they were subjected to an armed seizure by officers who could not point to anything:

> . . . in the activities of the person observed or in his surroundings that affirmatively suggests particular criminal activity. *Sibron* v. *New York,* supra, at 73 (Harlan, J., concurring).

The judgment of the Ninth Circuit Court of Appeals was correct in holding there were "far too many innocent inferences to make the officers' suspicions reasonably warranted." (Pet. App. 8a). See *Reid* v. *Georgia,* supra. The decision of that Court is correct and should be affirmed. The alternative is to vitiate Fourth Amendment protections for persons who travel by automobile. *Delaware* v. *Prouse,* supra; *United States* v. *Brignoni-Ponce,* supra; *Almeida-Sanchez* v. *United States,* supra.

C. The Court Of Appeals Properly Held That The Evidence Failed To Provide A Founded Suspicion That Respondents Were Engaged In Illegal Activity.

1. The Court of Appeals correctly considered both direct and circumstantial evidence and properly interpreted the applicable law in reaching its decision.

The petition for certiorari in this case accurately defined circumstantial evidence "as evidence from which an inference must be drawn to arrive at the proposition asserted. . ." (Pet. App. 15, fn. 8). An examination of this definition in conjunction with the Ninth Circuit

Court of Appeals' decision in the case at bar demonstrates that petitioner's argument B, at pages 18-25 of its brief, is entirely without foundation.

The Ninth Circuit has never made any legal distinction between direct and circumstantial evidence. *Rodella* v. *United States,* 586 F.2d 306, 312 (9th Cir., 1960), cert. denied, 365 U.S. 889 (1961); *United States* v. *Turner,* 528 F.2d 143, 162 (9th Cir., 1975), cert. denied, 423 U.S. 996 (1975). Petitioner even pointed out, in its petition for rehearing, at page 8, fn. 4, that the Ninth Circuit Court of Appeals has consistently relied on circumstantial evidence in founded suspicion cases. See *United States* v. *Laird,* 511 F.2d 1039 (9th Cir., 1975); *United States* v. *Clark,* 501 F.2d 492 (9th Cir., 1974), cert. denied, 419 U.S. 899 (1974). It is so unlikely as to be beyond belief that the court of appeals would overrule such a well established doctrine *sub silentio*. An examination of that opinion closes the door on petitioner's allegation that the court precluded the use of circumstantial evidence.

The Ninth Circuit opinion makes it clear at the outset that circumstantial evidence is relevant in determining whether a seizure violates the Fourth Amendment. This was accomplished by the court's utilization of the rule of law set forth by this Court in *United States* v. *Brignoni-Ponce,* supra, at 884:

> Officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that

> reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country. (Pet. App. 5a)

It is obvious from the definition of circumstantial evidence set forth above that when "rational inferences" are relied upon, circumstantial evidence is being employed.

Petitioner complains, at page 19 of its brief, that:

> The standard suggested by the court of appeals conflicts with *Brignoni-Ponce* because it would make most of the factors there identified as significant by this Court — the characteristics of the area, its proximity to the border, usual traffic patterns, previous experience with alien traffic, recent border crossings and the type of vehicle stopped — either irrelevant or superfluous.

Contrary to petitioner's allegation, the Court of Appeals expressly relied on several of the *Brignoni-Ponce* factors as set forth above including the absence of recent border crossings and the innocent appearance of respondents' vehicle. Petitioner cannot reasonably complain about the court's failure to find significance in the usual traffic patterns in the area as they were not unusual. The fact that tracks had been discovered twenty-seven miles away from the agents' position over two weeks earlier provides no connection with respondents and therefore carries no weight. The characteristics of the area and its proximity to the border also did not aid petitioner. Respondents' vehicle was seized on a well traveled east-west highway. This

highway is not a border access route and lies more than twenty-six miles from the border.

Although *Brignoni-Ponce* set forth several factors to be considered, it did not require that every court express its opinion in regard to each of those factors in every case, or even that the list it provided was exhaustive. The Court of Appeals relied on all the *Brignoni-Ponce* factors which were relevant in this case.[15] The major fallacy in petitioner's argument is not that the Ninth Circuit refused to look to the factors set forth in petitioner's brief as listed above, but instead properly viewed that evidence as favoring respondents. It is clear from the court's opinion that it considered the available circumstantial evidence and correctly drew the inference that no founded suspicion existed for the seizure of respondents' vehicle (Pet. App. 7a-8a).

2. Particularized suspicion is an essential element of Fourth Amendment protections afforded individuals.

Petitioner appears to clothe an appeal for a radical change in Fourth Amendment law in its circumstantial evidence argument. Petitioner argues, at page 23 of its brief, that although the agents had no facts "associated

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[15] Certainly, if the agents had obtained reliable information that aliens had been seen in the area, if the road in question was a dead end, or if the stop was made on a minor north-south roadway a few miles from the border, the court would have considered that information.

with an individual, his appearance and his behavior," the seizure in question should be upheld. References are also made to the plethora of clues available to the agents that illegal aliens had been active in a distant area weeks earlier. There was, however, no rational nexus between those clues and respondents' vehicle.

Petitioner's argument basically amounts to a request to this Court to eliminate the particularity requirement which has consistently been employed in Fourth Amendment cases. Granting this request would destroy the protections provided members of our society by the founded suspicion requirement.

This Court requires that law enforcement officials possess specific and articulable facts providing a founded suspicion that the particular individual seized is engaged in wrongdoing. "This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Terry* v. *Ohio,* supra, at 21, fn. 18. See also *Delaware* v. *Prouse,* supra, at 661-663; *Reid* v. *Georgia,* supra, *United States* v. *Brignoni-Ponce,* supra, at 884; *Adams* v. *Williams,* 407 U.S. 143, 146 (1972). This requirement was made crystal clear in *Brown* v. *Texas,* supra, at 51, where this Court, per Chief Justice Berger, held:

> To this end (preventing arbitrary invasions of privacy rights), the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the

seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers. *Delaware* v. *Prouse,* supra, at 663. See *United States* v. *Martinez-Fuerte,* 428 U.S. 543, 558-562 (1976).

Petitioner accuses the Ninth Circuit of abandoning the tenets set down by this Court, when, in reality, the government seeks to have the law of founded suspicion discarded. The Court's answer to this request was framed in the words of Mr. Justice Jackson:

> "These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." *Brinegar* v. *United States,* 338 U.S. 160, 180 (Jackson, J., dissenting). *Almeida-Sanchez* v. *United States,* supra, at 274.

CONCLUSION

The Ninth Circuit Court of Appeals properly found no reasonable suspicion for the seizure of respondents' vehicle.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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